

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
TEDDY DAVID AND PAMELA RUTH WEISS	:	DETERMINATION
	:	DTA NO. 810401
for Revision of a Determination or for Refund	:	
of Mortgage Recording Tax under Article 11 of	:	
the Tax Law with Reference to an Instrument	:	
Recorded on March 5, 1991.	:	

Petitioners, Teddy David and Pamela Ruth Weiss, One Seaforth Lane, Lloyd Neck, New York 11743, filed a petition for revision of a determination or for refund of mortgage recording tax under Article 11 of the Tax Law with reference to an instrument recorded on March 5, 1991.

A hearing was held before Frank W. Barrie, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on November 30, 1992 at 9:15 A.M., with all briefs to be submitted by February 8, 1993. Petitioners filed a brief on December 23, 1992, and the Division of Taxation submitted its answering brief on January 15, 1993. No reply brief was filed by petitioners. Petitioners appeared by Paul J. Laudato, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Donald C. DeWitt, Esq., of counsel).

ISSUE

Whether a mortgage given by petitioners, to the extent of \$2,263,914.92 of a total indebtedness of \$3,000,000.00, constituted a "supplemental mortgage" under Tax Law § 255 so that the portion representing the old indebtedness of \$2,263,914.92 was exempt from the mortgage recording tax.

FINDINGS OF FACT

Petitioners, Teddy David and Pamela Ruth Weiss, were developers of an office building on Long Island in Huntington, Suffolk County, New York. Their acquisition of the land and the financing of the building's construction was a five-year process which began in 1986.

On April 11, 1986,¹ petitioner Teddy David Weiss purchased land in Huntington, Suffolk County, from an individual named Felix Silvestri. Mr. Weiss assumed liability for a mortgage in the amount of \$600,000.00, which Mr. Silvestri had previously executed and delivered to Union Savings Bank on February 14, 1985. At the time of the recording of Mr. Silvestri's mortgage, mortgage recording tax in the sum of \$6,000.00 had been paid to the Suffolk County Clerk. On April 11, 1986, Mr. Weiss also executed and delivered to Union Savings Bank a mortgage in the sum of \$57,000.00, which covered the same property in Huntington, Suffolk County. At the time of the recording, mortgage recording tax of \$570.00 was paid. The two mortgages were consolidated to make one single lien in the sum of \$657,000.00.

Petitioners owned other properties on Long Island, at 569 Broadway and 585 Broadway in Massapequa, Nassau County, New York. It appears that Union Savings Bank required further security for its loan to petitioners, and the two mortgages were spread upon these Massapequa, Nassau County properties by

a spreading agreement, which was recorded in the office of the Suffolk County Clerk on May 29, 1986 and also in the office of the Nassau County Clerk on August 22, 1986.

About six months later, petitioners obtained additional financing for their project from Union Savings Bank, and on December 8, 1986, they executed and delivered to the bank an additional mortgage in the sum of \$1,250,000.00, which was recorded in the office of the Suffolk County Clerk on January 7, 1987 and in the office of the Nassau County Clerk on April 17, 1987. This additional mortgage covered the properties in Suffolk County and Nassau County. At the time of the recording, mortgage recording tax in the amount of \$12,500.00 was paid.

¹Petitioners and the Division of Taxation executed a "Stipulated Statement of Facts", dated November 19, 1992 by the Division's representative, which is incorporated into this determination. References to dates in the stipulation were qualified by the phrase "on or about". As a result, the dates used in the Findings of Fact are to be similarly qualified.

Another year later, petitioners obtained further financing for their project from Union Savings Bank, and on December 11, 1987, they executed and delivered to the bank a mortgage in the amount of \$500,000.00, which was recorded in the office of the Suffolk County Clerk on December 16, 1987. At the time of the recording of this mortgage, mortgage recording tax of \$5,000.00 was paid. This mortgage covered the Suffolk County property only.

On December 11, 1987, a consolidation agreement (also known as an "Affidavit of No Mortgage Tax") was also entered into, which resulted in a single mortgage lien in the principal sum of \$2,400,000.00.² The

consolidation agreement, which was secured by the Suffolk County property only, was recorded in the Suffolk County Clerk's office on December 16, 1987.

At petitioners' request, Union Savings Bank agreed to release the Nassau County properties from the coverage of the lien of the mortgages as consolidated, or in the language of the bank's "Release of Part of Mortgaged Premises", the bank "agreed to give up and surrender the lands hereinafter described" to petitioners. According to the testimony of Mr. Weiss, the construction of the office building had been completed and there was enough equity in the building to cover the bank's "exposure" on the mortgage loans so that petitioners' Nassau County properties could be released. As a result, on December 11, 1987, at the closing for the mortgage of \$500,000.00 and the consolidation agreement of \$2,400,000.00, a release, also dated December 11, 1987, was executed by Edward J. Krug, Union Savings Bank's vice-president. An attorney, Donald Keegan, who represented the title company (Title USA Insurance Corporation of New York) at the closing, testified that a release was prepared that referenced the release of the properties in Nassau County only as the parties intended. A bill on the letterhead of the title company which shows a fee for the recording of only one release (in

²The stipulation references this amount. However, the sum of the mortgages noted above (\$600,000.00, \$57,000.00, \$1,250,000.00 and \$500,000.00) is \$2,407,000.00. Perhaps the difference is the result of some principal having been paid off on one of the mortgages. The record does not provide an explanation for the slight variance.

Nassau County) bolsters Mr. Keegan's testimony. Furthermore, a review of petitioners' Exhibit "12", which is a photocopy of the release, as prepared for the closing on December 11, 1987, references for release in its Schedule A the Nassau County properties only. However, the release, as recorded, was not the same document as prepared for the closing on December 11, 1987 (Exhibit "12"). Instead, an additional page was added to the release, as recorded, which described the Suffolk County property, and changed the intended partial release into a total release. Mr. Keegan testified as follows with reference to how this error occurred:

ADMINISTRATIVE LAW JUDGE: "Now, this closing occurred in December of 1987."

ATTORNEY KEEGAN: "That is correct."

ADMINISTRATIVE LAW JUDGE: "And in listening to your testimony it appears that the error occurred (and by error I mean the inclusion of the description of the Suffolk premises as part of the release that was actually recorded) in the title company's office by a recording clerk."

ATTORNEY KEEGAN: "I have to presume that. I don't know that but I presume so."

ADMINISTRATIVE LAW JUDGE: "In looking back, that's your best guess in terms of what happened?"

ATTORNEY KEEGAN: "That's right."

ADMINISTRATIVE LAW JUDGE: "Was this a particularly busy time of year, do you recall, December 1987?"

ATTORNEY KEEGAN: "Just a lot of partying going on at Christmas time, so, who knows."

However, it would seem that someone had to unstaple an executed document to add an additional page, an action that would not appear to be in the routine course for preparing documents for recording or something that a clerk would do without direction from someone with higher authority. Nonetheless, a finding may be made that the total release, as recorded, was not what the parties intended, and, in fact, conflicts with the very title of the document, "Release of Part of Mortgaged Premises" (emphasis added).

As a result of the recording of the release in the Suffolk County Clerk's Office, the

consolidated mortgages held by Union Savings Bank covered no real property.³ Nevertheless, petitioners continued to

make payments and the mortgagee, Union Savings Bank, continued to receive and apply the payments to the mortgaged indebtedness.

Petitioners did not uncover the mistake made by the title company until nearly three years later. Mr. Weiss testified that in 1991, he had the option of renewing the three-year note petitioners had with Union Savings Bank but at a much higher interest rate:

"So, we went for a new mortgage through FGH Holding Corporation which is known as Friesch [Friesch-Groningsche Hypotheekbank Realty Credit Corporation] And the mortgage was in the amount of three million dollars. And at that time . . . we found out that the property really had no mortgage on it."

Petitioners had intended to assign the existing mortgages held by Union Savings Bank, which had a total balance due of \$2,263,914.92, to Friesch. An additional mortgage in the amount of \$736,085.08 would be executed to Friesch and consolidated with the assigned Union Savings Bank mortgages to form a consolidated indebtedness of \$3,000,000.00.

It appears that Security Title and Guaranty Company, a title company hired for the planned transaction with Friesch, uncovered the mistake. This title company, by its vice-president and counsel, Amelia J. Kelly, sought advice from the Division's Technical Services Bureau by a letter dated February 6, 1991. The question posed was:

"[I]f the parties record a corrected release, eliminating the Suffolk parcel as a released parcel, can the mortgages be properly assigned in that they continue to secure an ongoing obligation without incurring mortgage tax liability?"

The Technical Services Bureau responded by a letter dated March 6, 1991 as follows:

"It is our opinion that upon release of all of the premises from the liens of the mortgages, the mortgages ceased to continue as perfected prior liens. An instrument that does not impose a lien on or affect title to real property cannot be considered a mortgage within the taxing statute.

"At the time the consolidation agreement was recorded the parties requested

³The consolidation agreement was recorded two minutes after the release was recorded in the Suffolk County Clerk's Office.

exemption from tax, relying on section 255 of the Tax Law as a basis for exemption. This exemption was erroneously granted by the recording officer of Suffolk County as the liens of the prior mortgages no longer continued to exist. The consolidation agreement was not supplemental to the prior mortgages, but rather superceeded [sic] or replaced such prior mortgages. The consolidation agreement constitutes a new mortgage creating a new lien which gives rise to a new tax.

"Therefore, as the proper tax was not paid on the recording of the consolidation agreement, an assignment of these mortgages, as consolidated, may not, pursuant to section 258 of the Tax Law, be recorded."

As a result of the above opinion of the Technical Services Bureau, Friesch demanded that, for the refinancing and loan transaction to proceed, petitioners execute a new mortgage loan in the sum of \$3,000,000.00 instead of the assignment of the Union Savings Bank mortgages with total principal outstanding of \$2,263,914.92 and a new mortgage loan in the lesser sum of \$736,085.08 (together totalling \$3,000,000.00).

Petitioners went forward with the refinancing and loan transaction with Friesch and executed a mortgage in the amount of \$3,000,000.00 to Friesch. They paid a mortgage recording tax of \$30,000.00 under protest to record the mortgage in the Suffolk County Clerk's Office on March 5, 1991.

Mr. Weiss testified that petitioners did not attempt to rectify the error in the recorded release prior to their closing with Friesch for the following reason:

"My back was against the wall. We had no time. It was time of the essence and quite frankly if we didn't close we could have lost the building. So, the thing was get it done, pay, and we have been waiting now for close to two years [to obtain a refund]."

Petitioners requested a refund of mortgage recording tax in the amount of \$22,847.55 contending that only \$7,152.45 was due on "the additional or 'fresh' money" of \$715,245.06. By a letter dated December 2, 1991, petitioners' refund claim was denied for the following reason:

"Although it may have been the intention of the parties for the new mortgagee to take by assignment the mortgages held by Union Savings Bank, this in fact did not happen. As stated in the response of the Technical Services Bureau, such assignment was prohibited by Section 258 of the Tax Law since the proper amount of tax was not paid at the time the 1987 Consolidation Agreement was recorded.

"Also, it is indicated that the mortgagors complied with the new mortgagee's request that a new mortgage be executed in the full amount of \$3,000,000.

"Accordingly, this new mortgage is clearly not a supplemental mortgage which would fall within the ambit of Section 255 and therefore the Suffolk County Clerk properly collected the tax of \$30,000 when the mortgage was recorded."

The parties stipulated that, in addition to the Division's denial of petitioners' refund claim, the Division:

"held that upon the recording of the consolidation agreement [described in Finding of Fact '4'] the sum of \$24,000.00 in mortgage tax should have been paid rather than the sum already paid, \$5,000.00 and this has resulted in a demand for payment of an additional mortgage tax of \$19,000.00 to be paid."

However, at the hearing, the Division's representative noted:

"To my knowledge, there is no demand for this \$19,000 amount, that is apparently being held in escrow by the title company, although in one of the exhibits that has been introduced, perhaps in two exhibits, there is a reference to the fact that the department intended to make such a demand.⁴ To my knowledge no such demand has been made. If it has, I don't believe that particular demand is before this tribunal."

SUMMARY OF THE PARTIES' POSITIONS

Petitioners argue that the four mortgages, as consolidated by agreement on December 16, 1987, were "valid and legal instruments" because it was obvious that an error had been made in the release as recorded because "a lending institution would not purposely enter into a lending arrangement for \$2,400,000.00 wherein it had no security." Therefore, the opinion of the Technical Services Bureau (detailed in Finding of Fact "9") was incorrect. Petitioners should have been able to assign the Union Savings Bank mortgages to Friesch. Mortgage recording tax on the \$3,000,000.00 mortgage given to Friesch "should have been computed on the new monies advanced" to avoid inequity and "double taxation". Petitioners note that:

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A review of the exhibits discloses a reference to a demand for additional mortgage tax of \$19,000.00 in the stipulation of facts only as detailed above. The petition and the answer do not address as an issue this so-called "demand" by the Division for additional mortgage tax of \$19,000.00. At the hearing, petitioners' representative in his opening statement stated that "that claim [for \$19,000.00] was forthcoming and we had included relief from that claim in our petition." However, as noted, the petition did not explicitly address the issue of any additional liability on the part of the taxpayers.

"[A]t the time of the proposed assignments by Union Savings to Friesch, time was of the essence and there was insufficient time to commence a reformation proceeding [to correct the error in the release]."

In contrast, the Division maintains that "whatever remedy might have been available to the petitioners to reform the 1987 transaction, such steps were not pursued" According to the Division, mortgage recording tax of \$30,000.00 was properly paid on a mortgage with a face amount of \$3,000,000.00. Furthermore, the Division offers what appears to be an alternative justification for its position:

"Whatever the reason for the release of the Suffolk parcel the effect is the same: once the release was recorded, the mortgages sought to be consolidated did not impose a lien or affect title to the Suffolk parcel. Therefore, the 1987 consolidation agreement was a new mortgage and subject to mortgage tax."

Consequently, according to the Division, the 1987 consolidated mortgages could not be further consolidated or assigned to Friesch because the appropriate mortgage recording tax was not paid in 1987 when the consolidation agreement was recorded.

CONCLUSIONS OF LAW

A. Tax Law § 253(1) imposes a mortgage recording tax:

"for each one hundred dollars and each remaining major fraction thereof of principal debt or obligation which is, or under any contingency may be [,] secured at the date of the execution thereof or at any time thereafter by a mortgage on real property"

The mortgage recording tax is not a tax on property but rather is imposed upon the privilege of recording a mortgage; the underlying debt is the basis for computation (Matter of S. S. Silberblatt, Inc. v. State Tax Commn., 5 NY2d 635, 186 NYS2d 646, cert denied 361 US 912, 4 L Ed 2d 183).

B. Tax Law § 250 defines "mortgage" as "every mortgage or deed of trust which imposes a lien on or affects the title to real property."

C. Petitioners claim an exemption from the mortgage recording tax pursuant to Tax Law § 255 which provides, in relevant part, as follows:

"If subsequent to the recording of a mortgage on which all taxes, if any, accrued under this article have been paid, a supplemental instrument or mortgage is recorded [1] for the purpose of correcting or perfecting any recorded mortgage, or [2] pursuant to some provision or covenant therein, or [3] an additional mortgage is

recorded imposing the lien thereof upon property not originally covered by or not described in such recorded primary mortgage for the purpose of securing the principal indebtedness which is or under any contingency may be secured by such recorded primary mortgage, such additional mortgage shall not be subject to taxation under this article, unless it creates or secures a new or further indebtedness or obligation secured by or which under any contingency may be secured by the recorded primary mortgage" (numerals added).

It is observed that the first criteria for exemption numbered above has been liberally interpreted by the Court of Appeals to include an exemption from mortgage recording tax for a so-called "extension agreement" which released the original obligor while adding new obligors who assumed the mortgage debt (Suffolk County Federal Savings & Loan Assn. v. Bragalalini, 5 NY2d 579, 186 NYS2d 602). Similarly, the determination of the former State Tax Commission was also annulled in Brodsky v. Murphy (26 AD2d 225, 272 NYS2d 238, 240) because:

"The absence of a cancellation of the original mortgage or a showing of an additional or new indebtedness precludes a finding that in fact there was a new mortgage loan"

However, in the matter at hand, unlike the cases cited above, petitioners' original mortgages with Union Savings Bank were, in effect, extinguished due to the error in the release as recorded.

D. Petitioners face the unavoidable fact that they executed a new mortgage of \$3,000,000.00 to Friesch. In Sverdlow v. Bates (283 AD 487, 129 NYS2d 88), the court noted that "the mortgage tax was payable merely because of the fact that the old mortgages had been discharged and new mortgages had been given." The taxpayer's argument in Sverdlow, that "since the same result could have been obtained without the payment of a tax by use of an instrument of a different form, it is inequitable to require a payment of the tax" (id., at 91), was rejected by the court. The court noted:

"If a transaction comes within the form which the statute has made taxable, it is no answer to say that it is indistinguishable in substance from a transaction in a different form which could have accomplished the same result in a non-taxable manner" (id.).

E. As noted in Finding of Fact "13", petitioners did not seek to rectify the error in the recorded release because of the pressures of time. As a result, the transaction was structured in

a form that subjected the entire indebtedness of \$3,000,000.00 to mortgage recording tax. The fact that they might have been able to correct the release and proceed with an assignment of mortgages which would have resulted in the taxability of the "fresh money" only does not alter the fact that the transaction came "within the form which the statute has made taxable" (Sverdlow v. Bates, *supra*, at 91).

F. It is observed that the jurisdiction of the Division of Tax Appeals is limited by statute (Matter of Meyers, Tax Appeals Tribunal, June 3, 1993). Consequently, whether petitioners should have been allowed to reform the release as recorded is not at issue. Rather, the matter at hand involves a review of the Division's denial of petitioners' claim for refund of mortgage recording tax paid to record Friesch's \$3,000,000.00 mortgage. Since it is concluded that the Friesch mortgage was a new mortgage for purposes of the mortgage recording tax, the Division's denial of petitioners' refund claim was proper. Although the result may seem inequitable, the Friesch mortgage was properly treated as a new mortgage for mortgage recording tax purposes, and petitioners' complaint of "double taxation" is without merit.

G. The petition of Teddy David and Pamela Ruth Weiss is denied, and the denial of petitioners' refund claim is sustained.

DATED: Troy, New York
July 29, 1993

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE